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PATENTS—JUDICIAL LEGISLATION.—One Deitch conceived an invention in 1912; Doulett conceived the same idea in 1913; Muther conceived it in January, 1914, and Glines in March, 1914. All filed applications for a patent at about the same time, August, 1914, and interference proceedings were begun to determine the right to a patent. Under the express wording of the Patent Act the answer would seem clear. It provides, R. S. 4886, that "any person who has invented or discovered any new and useful art, * * * not known or used by others in this country, before his invention or discovery thereof, * * * and not in public use or on sale in this country for more than two years prior to his application," shall be entitled to a patent, "unless (the invention) is proved to have been abandoned."

In the case in question Deitch, the first of the four to conceive the idea, was the only one whose concept was not already known to others. His invention had not been on sale or in public use prior to his application. If he had lost his right at all, according to the statute, it was only because he had been proved to have abandoned his invention to the public. But *abandonment* "is like the dedication of a public way or other easement, and is to be proved in the same manner by evidence of some acts inconsistent with the retention of exclusive property in himself." *Babcock v. Degener*, Fed. Cas. No. 698; *Johnsey v. Fassman*, Fed. Cas. No. 7365; *W. W. Sly Mfg. Co. v. Russell*, 189 Fed. 61. It is always a question of fact. *Kendall v. Winsor*, 21 How. 322, 331. "Merely withholding his invention from the public can never amount to an abandonment." *Babcock v. Degener, supra*; *Bates v. Cœ*, 98 U. S. 31, 46; *Egbert v. Lippmann*, 104 U. S. 333. As Deitch was not proved to have abandoned his invention, he had not lost his right to a patent according to the express terms of the statute.

The courts, however, on the ground of "public policy" have decided that an inventor may lose his right to a patent in a manner not provided for in the statute, namely, through failing to apply for it with "due diligence." It is sometimes suggested in justification of these decisions that there is in fact no "invention" to be patented until it has been "reduced to practice." *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 489. "A conception of the mind is not an invention until represented in some physical form." *Ellithorp v. Robertson*, Fed. Cas. No. 4408. But, on the other hand, "Reduction to practice is not merely a matter of construction, building and trial, but may consist in the disclosure of the idea by any kind of description, pictorial, verbal, or written, which will enable one skilled in in the art to make and use that which is disclosed." *Curtiss, etc., Corp. v. Janin*, 278 Fed. 454. In the recent case of *Automatic Elec. Co. v. Dyson* (D. C., 1922), 281 Fed. 586, there was no doubt that the first conceptor had reduced his idea to practice in the sense of so completely disclosing it that others could make and use it. Yet he was held to have lost his right to a patent through delay in application. And in other cases inventors have been held to have lost the right to a patent through delay in application, even though the idea had been reduced to actual commercial use. See "Secret Use as Affecting Right to a Patent," 17 MICH. L. REV. 499. The decisions, therefore, simply add to the statute another cause for loss of

right to a patent. Accordingly, in the case under discussion, Deitch was held to have lost his right. *Douleett v. Muther* (D. C., 1922), 277 Fed. 600.

Douleett's delay was held to be so far justified by the circumstances as not to derogate his right to a patent.

But his right would seem to be otherwise precluded by the statutory provision that the invention be "not known or used by others." Such prior knowledge by others need not be patented to preclude a subsequent patent. *Sturtevant v. Greenough*, Fed. Cas. No. 13579; *Pickering v. McCullough*, Fed. Cas. No. 11121, 104 U. S. 310. Furthermore, prior knowledge by only one person may be sufficient. *Coffin v. Ogden*, 18 Wall. 120; *Twentieth Century Co. v. Loew Mfg. Co.*, 243 Fed. 373, 378; *Bannerman v. Sanford*, 99 Fed. 294. This would seem clearly to preclude Douleett from a patent, as the court states that Deitch knew of the invention before Douleett conceived it.

Again, it might be argued that an invention is not an "invention" capable of being known until it has been reduced to practice; "to know a drawing or a model is not the same thing as knowing the article which that drawing or model more or less imperfectly pictures to the eye." But again the argument is destroyed by the fact that inventions which have never been put to use, or even embodied in tangible form, are every day being patented and mere written descriptions in patent office records or elsewhere are being held to show prior knowledge. *Phila. & Trenton R. R. Co. v. Stimson*, 14 Peters 448, 461; *Automatic, etc., Co. v. Pneumatic, etc., Co.*, 166 Fed. 288; *Evans v. Associated, etc., Co.*, 241 Fed. 252; *In re Borger*, 277 Fed. 862.

A patent was granted, however, to Douleett, the second to conceive the idea, without discussion of the fact that it had obviously been known before. The same decision was reached in *Automatic Electric Co. v. Dyson, supra*, although others than the first inventor knew the idea before the second inventor conceived it. In *Mason v. Hepburn*, 13 App. D. C. 86, the first invention had even been so far embodied in tangible form that it could have been practicably used if desired and was known to others than the inventor. The court rejected the pretense that the first knowledge was a "lost art." It frankly admitted that the patentee was the "second inventor," but justified the granting of a patent to him on "public interest" in a liberal "interpretation" of the patent statute.

As the courts have already held that "secret use" is not such "reduction to practice" as will save an inventor from loss of right to a patent through unreasonable delay in applying, 17 Mich. L. Rev. 499, one wonders if prior knowledge by others which is confined to "secret use" will be held not to characterize an invention as "known or used by others." The courts have already changed the statutory phrase "known or used" to "known and used." Will they further change it to "known and used in public"? If they come to that point, *Coffin v. Ogden*, 18 Wall. 125, will probably be cited by both sides.

J. B. W.